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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 281

ALUMINUM COMPANY OF AMERICA, APPELLANT

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR GOVERNMENT COUNSEL NAMED "PARTIES DEFENDANT"

OPINIONS BELOW

The opinion of District Judge Gibson granting a preliminary injunction (R. 149) is reported in 19 F. Supp. 374. The opinion of the specially constituted Expedition Court denying a permanent injunction (R. 180) has not been reported.

JURISDICTION

The final decree of the Expedition Court was entered July 27, 1937 (R. 186). On the same day the petition for appeal was filed (R. 187), and an

order was entered allowing appeal (R. 188). Probable jurisdiction was noted by this Court on October 11, 1937.

Jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended (U. S. C., Tit. 28, Sec. 345), and the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended, known as the Expediting Act (U. S. C., Tit. 15, Sec. 29).

QUESTION PRESENTED

Whether the district court, in which an antitrust consent decree against Aluminum Company was entered in 1912, erred in refusing to enjoin counsel for the United States from prosecuting a comprehensive antitrust suit, filed in 1937 in another district against 63 defendants, seeking dissolution of the Aluminum Company and injunctive relief against an alleged monopoly.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, c. 647, July 2, 1890, 26 Stat. 209 (U. S. C., Tit. 15, Sec. 5), the Clayton Act, c. 323, October 15, 1914, 38 Stat. 730, as amended (U. S. C., Tit. 15, Sec. 22), and the Expediting Act, c. 544, February 11, 1903, 32 Stat. 823, as amended (U. S. C., Tit. 15, Secs. 28–29), are referred to in the body of the brief.

STATEMENT

This is an appeal from a decree (R. 186) of a specially constituted Expedition Court, sitting as

the United States District Court for Western Pennsylvania, denying a permanent injunction to restrain prosecution of an antitrust injunction suit instituted by the United States in the United States District Court for Southern New York against appellant and others.

On April 23, 1937, the United States instituted suit in equity under the Sherman Act in the District Court for the Southern District of New York, naming as defendants the appellant and 62 others (R. 92). The bill charges that defendants have monopolized and conspired to restrain and monopolize interstate and foreign trade and commerce in aluminum and related commodities (R. 105). It alleges that Aluminum Company has a 100 per cent monopoly of virgin aluminum manufactured in the United States, a 90 per cent monopoly of aluminum sheet, a 95 per cent monopoly of aluminum alloy, and virtually a 100 per cent monopoly of extruded and structural shapes, wire, cable, bars, rods, and tubing made from aluminum (R. 106–108). By virtue of such monopolistic control, it is alleged, Aluminum Company has the illegal power to fix arbitrary prices and exclude others who would, except for such monopolistic control, engage in competition with Aluminum Company (R. 108). The bill also alleges that defendants have preserved the monopoly by curtailing imports through cartel agreements and intimidation of foreign producers (R. 108–120), that it

has acquired and maintained the monoply by unfair and oppressive tactics (R. 121–132), and that it has used its monopolistic power to fix arbitrary, oppressive, and unreasonable prices (R. 131–132).

The New York petition prays for (1) dissolution of Aluminum Company, rearrangement of its properties under several independent corporations, and appointment of receivers and trustees to effectuate the dissolution, (2) divorcement of Aluminum Company and Aluminium Limited by requiring stockholders common to both to divest themselves of stockholdings in one or the other of the two companies, and (3) injunctive relief against further monopoly and restraints (R. 133–135).

On April 29, 1937, Aluminum Company filed an ancillary petition in a suit entitled "United States of America v. Aluminum Company of America", instituted in 1912 in the Western District of Pennsylvania, asserting that the subject matter and issues in the New York suit were identical with those adjudicated by the consent decree filed in the Pennsylvania court on June 7, 1912 (R. 78, 80). The original suit in Pennsylvania had been filed on May 16, 1912 (R. 8), and had terminated three weeks later with a consent decree canceling restrictive covenants in five contracts and enjoining Aluminum Company, its officers, agents, and representatives from engaging in certain monopolistic, unfair, and discriminatory practices (R. 64–73). Appellant's ancillary petition took the position

that since the jurisdiction of the Pennsylvania court first attached to the subject matter and parties, its jurisdiction was exclusive and should be protected (R. 89). It alleged that Aluminum Company, its subsidiaries, officers, and directors would suffer irreparable injury if they were required to defend the New York suit (R. 89–90).

On the same day, April 29, 1937, a district judge in the Western District of Pennsylvania, without notice to the United States, issued an order making the Attorney General and seven other members of the Department of Justice "parties defendant" in the Pennsylvania suit of 1912, and temporarily restraining them from prosecuting the New York suit (R. 135–136). Government counsel entered a special appearance May 6, 1937, for the purpose of moving to quash service of subpoenas made upon them outside the Western District of Pennsylvania, to set aside the marshals' returns, to dismiss Aluminum Company's petition, and to vacate the restraining order (R. 136–138). On May 14, 1937, the district judge denied the motion (R. 153), and granted a preliminary injunction restraining government counsel from prosecuting the New York suit or proceeding in any court other than the Pennsylvania court against Aluminum Company, 19 subsidiaries, 17 officers and directors, and two former directors (R. 141–142).

On June 3, 1937, government counsel filed an answer to the ancillary petition, averring that the

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subject matter, issues, parties, and relief sought in the New York suit differed substantially from those in the 1912 Pennsylvania suit (R. 153–156).

On June 8, 1937, the Attorney General filed a certificate in the Pennsylvania case under the Expediting Act (U. S. C., Title 15, Sec. 28), certifying that because of the district judge's action in making government counsel "parties defendant" and temporarily enjoining them from proceeding in the New York suit, the cause had recently become a case of "general public importance" requiring the prompt consideration of not less than three circuit judges (R. 157–160).

On June 14, 1937, Circuit Judges Davis, Thompson, and Biggs were designated to comprise the Expedition Court to determine the issues presented by Aluminum Company's ancillary petition and the answer and motions of government counsel (R. 160–162). These issues were tried before the Expedition Court on June 23, 1937 (R. 219), the Aluminum Company presenting the testimony of two witnesses to support its claim of inconvenience and irreparable injury in defending the New York suit (R. 224–257).

On July 21, 1937, the Expedition Court filed an opinion holding that the subject matter, parties, issues, and relief sought in the New York suit differed substantially from those of the Pennsylvania suit, that the two suits involved no conflict, and that appellant would suffer no irreparable in-

jury in defending the New York suit, together with supporting findings of fact and conclusions of law (R. 174–185). It entered a final decree July 27, 1937, dismissing appellant's petition, vacating the *ex parte* order making government counsel parties defendant, and denying the injunctive relief sought by appellant (R. 186).

SUMMARY OF ARGUMENT

I. There is no merit in appellant's contention that it is entitled to an injunction against the maintenance of the New York suit on the ground that the subject matter and issues presented in that suit are identical with those involved in the Pennsylvania consent decree entered against appellant in 1912. The lack of identity in subject matter is of itself a sufficient ground for denial of the relief sought. *Watson* v. *Jones,* 13 Wall. 679. Entry of the consent decree in Pennsylvania does not exclude all other courts from adjudicating related subject matters in a cause of action arising 25 years later. *Buck* v. *Colbath,* 3 Wall. 334; *Memphis City Bank* v. *Tennessee,* 161 U. S. 186, 192–193. The New York petition names 62 new defendants. The New York suit differs from the Pennsylvania suit in the issues presented. There is striking contrast between the charge in the New York petition that appellant's monopoly is illegal *per se* and any issue presented by the Pennsylvania petition. The prayer for dissolution of appellant and distribu-

tion of its properties in the New York suit seeks relief far more drastic than that called for by the Pennsylvania petition and afforded by the consent decree.

II. Even if the subject matter and issues of the two suits were identical appellant would not be entitled to the relief sought. The principle that a court of equity which first acquires jurisdiction of a cause retains exclusive jurisdiction is a rule of necessity which applies only "to prevent the defeat or impairment of its jurisdiction." *Steelman, Trustee* v. *All Continent Corporation,* 301 U. S. 278, 289; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 229, 235; *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 198. In no way does the New York suit operate to "impair" or "defeat" the jurisdiction of the Pennsylvania court. It does not affect any *res* under the protection of the Pennsylvania court; it is not a suit by a defeated party to relitigate issues adjudicated against it; and it does not involve any multiplicity of suits regarding any matter in active litigation in the Pennsylvania court. The finding of the Expedition Court that "the New York suit does not subject Aluminum Company to the peril of two conflicting decrees" (R. 176) is manifestly correct. Appellant acquired no vested right under the consent decree to be immune from subsequent dissolution suits in other courts.

III. Appellant has shown no facts which justify the intervention of a court of equity to re-

strain prosecution of the New York suit. The inconvenience to which it may be subjected in retaining counsel and producing records in the defense of that suit is not irreparable injury. It is not shown that the New York suit is vexatious or designed to harass appellant. Although appellant may assert in the New York suit any equities which may exist in its favor and may call for a preliminary trial of issues raised by a motion to dismiss (Equity Rule 29), it has filed an answer in the New York court without raising any question of *res judicata,* estoppel or identity of suits. Appellant has shown no injury which it may suffer by reason of the existence of two harmonious decrees.

The injunctive relief sought by appellant would defeat the statutory right of the United States to select the venue. Moreover, it would impair the right and duty of the United States to enforce the Sherman Act, because the purpose of the New York suit cannot be accomplished by contempt proceedings under the consent decree or by supplemental proceedings in the Pennsylvania suit. See *United States* v. *International Harvester Co.,* 274 U. S. 693.

IV. Jurisdiction of the Expedition Court was properly invoked under Section 1 of the Expediting Act. *Ex parte United States,* 226 U. S. 420, 424. The maintenance of a special appearance by government counsel did not impair the jurisdiction of the specially constituted court. *Cf. Wabash Western Railway* v. *Brow,* 164 U. S. 271, 278.

ARGUMENT

I

THE NEW YORK SUIT SHOULD NOT BE ENJOINED, BECAUSE THE PARTIES, SUBJECT MATTER, ISSUES, AND RELIEF SOUGHT ARE SUBSTANTIALLY DIFFERENT FROM THOSE IN THE 1912 SUIT

Appellant's contention that it is entitled to an injunction restraining the prosecution of the New York suit rests upon the proposition that the subject matter and issues presented in that suit are identical with those which were determined in the Pennsylvania suit (R. 80; Brief, p. 12).

The identity which must exist between two suits if one is to bar the maintenance of the other was early stated by this Court in *Watson* v. *Jones,* 13 Wall. 679. In that case it was held that a suit in a federal court to enjoin defendants from taking possession of certain church property was not barred by the determination of a state court in a pending proceeding that defendants were lawful officers of the church, because subsequent to the rendition of the first decree defendants' status had changed. In stating the conditions under which the pendency of one suit may bar the prosecution of another, this Court said (p. 715):

> *There must be the same parties,* or at least such as represent the same interest, *there must be the same rights asserted, and the same relief prayed for. This relief must be*

> *founded on the same facts, and the title or essential basis of the relief sought must be the same.* The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties. [Italics supplied.]

The same principle was recognized in *The Haytian Republic,* 154 U. S. 118, 124, and in *Pacific Live Stock Co.* v. *Oregon Water Board,* 241 U. S. 440. In the latter case it was held that the pendency of suits instituted by plaintiff to establish certain water rights provided no basis for restraining the prosecution of a proceeding before a state administrative body involving the same water rights and the same claimants. The Court stated (p. 447):

> The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined in its operation to instances *where both suits are substantially the same, that is to say, where there is substantial identity in the interests represented, in the rights asserted and in the purposes sought.* [Italics supplied.]

In *United States* v. *Southern Pacific Co.,* 259 U. S. 214, the United States sought a decree under the Sherman Act requiring the Southern Pacific to

relinquish control of the Central Pacific on the ground that their lines were competitive. The Central Pacific contended that an earlier suit approving the acquisition by the Southern Pacific of certain stock of the Central Pacific constituted a bar to this proceeding. This Court rejected that contention, saying (p. 240):

> It is insisted that the decree in the *Union Pacific Case* is decisive of this controversy, and amounts to an adjudication against the Government of the issues involved. The conclusive answer to this contention is that the Central Pacific was not a party to that suit up to the final decree in this court. That suit and the present one do not relate to the same subject-matter. The issues and questions, therein decided, are not the ones presented for decision here. *Cromwell* v. *County of Sac,* 94 U. S. 351; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451.

The requisite identity of parties and subject matter is not established merely by showing a close relationship between two suits. In *Buck* v. *Colbath,* 3 Wall. 334, an action of trespass was instituted in a state court against a United States marshal for the taking of goods seized under a writ of attachment. In affirming a judgment for the plaintiff this Court rejected the defendant's contention that the federal court, which had first acquired jurisdiction of the cause in which the at-

tachment was issued, had exclusive jurisdiction to determine the issues presented in the state proceeding. The Court stated (p. 345):

> * * * it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.
>
> In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the *nature of the remedies, the character of the relief sought, and the identity of the parties* in the different suits. [Italics supplied.]

In denying appellant's application for injunctive relief in this proceeding (R. 186) the Expedition Court found that the parties, subject matter, issues and relief prayed for in the New York suit were substantially different from those of the 1912 suit (R. 176, 179). An examination of the petitions filed in the two suits [1] demonstrates that appellant's objections to this finding (R. 191, 194–195) are without merit.

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[1] Reference to pleadings is proper to determine the scope of the decree entered in 1912. *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 508; *Vicksburg* v. *Henson*, 231 U. S. 259, 269; *Bates* v. *Bodie*, 245 U. S. 520, 526; *Oklahoma* v. *Texas*, 256 U. S. 70, 86.

A. THE PARTIES DEFENDANT IN THE TWO SUITS ARE DIFFERENT

In the Pennsylvania suit appellant was the sole defendant (R. 9). The petition filed in New York names 62 additional defendants (R. 95). Appellant contends that insofar as the additional defendants are its wholly owned subsidiaries or its officers, agents, and directors they are bound by the terms of the 1912 decree (R. 80; Brief, p. 23). Assuming that this is true, there remain in the New York suit 23 defendants who bear no such relation to appellant (R. 80, 95). Three of these, including Aluminium Limited, are corporations which have been organized since 1912 (R. 96, 101–102).

In support of its contention that the New York suit should be enjoined despite the joinder of additional parties, appellant cites (p. 24) *Thompson* v. *Roberts,* 24 How. 233, and *Green* v. *Bogue,* 158 U. S. 478. These cases simply hold that issues adjudicated between two parties in one suit are *res judicata* as to them in a subsequent suit where there are additional parties. This elementary proposition is not disputed, but it has no application here. The question now presented is not whether certain issues adjudicated by the consent decree are binding upon Aluminum Company as *res judicata,* but whether the New York suit is substantially identical to the 1912 suit and should therefore be enjoined.

In the present case appellant makes no contention that all of the defendants named in the New York suit were parties defendant, or are in privity with parties defendant, in the Pennsylvania suit. Thus, in contending that appellant and 39 other defendants in the New York suit are bound by the terms of the consent decree, appellant tacitly concedes that 23 of the defendants in that suit have no connection with it upon which a claim of privity of interest may be predicated. Indeed, appellant expressly disclaims any desire to restrain the prosecution of the New York suit as to those defendants (Brief, p. 23). In view of the substantial increase in the number of defendants, there does not exist the identity of parties to the two suits which is necessary to make the consent decree a bar to the prosecution of the New York suit.

B. THE SUBJECT MATTER OF THE TWO SUITS IS DIFFERENT

The subject matter of the New York petition, which describes the growth of the aluminum monopoly from 1888, when Aluminum Company was organized, to 1937, is necessarily related to the subject matter of the 1912 suit. Both petitions charge violations of the Sherman Act, and certain of the allegations contained in the New York petition set forth facts which are also alleged in the 1912 petition. But the subject matter of the New York suit differs substantially from that of the Pennsylvania suit.

The present monopoly, which provides the basis for the New York suit, differs greatly from appellant's control of an industry comparatively in its infancy in 1912. Since the entry of the consent decree, appellant has expanded enormously, and it now occupies with reference to the aluminum and related industries a position of dominance which it did not approach in 1912. Thus, in 1912 the assets of appellant and its subsidiaries were estimated at $27,000,000 (R. 27), whereas in 1934 its net worth was shown by its annual report to be $174,808,682 (R. 106),[2] excluding from consideration those properties which were transferred to Aluminium Limited at the time of its organization in 1928 (R. 116). In the 1912 petition it was alleged that appellant produced, through its subsidiary, Aluminum Ore Company, approximately 80 per cent of the alumina used in the United States in the manufacture of aluminum (R. 25), while in the New York petition it is alleged that appellant now produces 100 per cent of the alumina used in the United States for the production of aluminum (R. 106). Appellant admits that it now produces 100 per cent of all the virgin aluminum manufactured in the United States, and that it uses 100 per cent of the bauxite used in the United States for the production of aluminum (R. 283). Appel-

[2] In its answer in the New York suit appellant asserts that its net worth in 1934, as shown by its annual report, was $169,505,514.55 (R. 282).

lant is now an integrated monopoly. In addition to the interests it possessed in 1912 in bauxite deposits, alumina production, and the manufacture of aluminum, it has since acquired additional fabricating plants (R. 97, 98), electric power plants (R. 98–100), railroads (R. 98, 100–101), a chemical solvent plant (R. 99), a wharfage company (R. 100), holding companies (R. 100–102), a steamship company (R. 100), and a foreign corporation engaged in mining bauxite (R. 101). In the words of the Expedition Court, there is "only such similarity as may exist between an infant and a full grown man" (R. 183).

The New York petition describes a far-reaching scheme for the restraint of foreign competition which has been adopted since the entry of the consent decree in 1912. It alleges that appellant, for the purpose of restraining competition from foreign manufacturers, acquired vast interests in foreign corporations engaged in the production of bauxite, aluminum and electric energy (R. 108–120); that in 1928 it organized defendant Aluminium Limited as a Canadian corporation and transferred to it substantially all of these foreign holdings (R. 116); and that through the ownership by a small group of persons of a controlling interest in both Aluminum Company and Aluminium Limited (R. 116), the latter corporation is employed by Aluminum Company as an instrumentality to evade the antitrust laws by making alli-

ances and agreements as a foreign corporation with other foreign producers to restrict competition and curtail imports into the United States (R. 117–120). It is alleged that Aluminium Limited, by agreement with appellant, does not compete in the United States (R. 117).

The New York petition alleges that appellant's monopoly has been acquired and maintained by unfair and oppressive tactics (R. 121–133). Because it comprehensively attacks the monopolistic activities of Aluminum Company since its origin, the petition necessarily describes the complete history of the monopoly, including the five restrictive contracts canceled by the 1912 decree (R. 109–110, 122–125). Most of the allegations, however, relate to monopolistic activities after 1912 (R. 106–108, 110–120, 125–132). The circumstances which provide the basis for the New York suit differ materially from those which provided the subject matter of the Pennsylvania suit.

The substantial alteration in conditions is of itself a sufficient ground for the denial of the relief sought by appellant. The consent decree cannot operate as a bar, because the New York suit rests upon substantially different facts. As stated in *Memphis City Bank* v. *Tennessee,* 161 U. S. 186, 193, "the judgment could, therefore, not be an estoppel or operate in any manner as a bar to the maintenance of this action, based upon facts of a totally different nature, and arising long after the

judgment was obtained in the former action." In *Watson* v. *Jones,* 13 Wall. 679, this Court stated that if the pendency of one suit is to be set up to defeat another, the relief sought in the two suits must be founded on the same facts.

Appellant contends that no significance is to be attached to the change in circumstances which has occurred since 1912 because the consent decree embodied a continuing injunction. Thus it is stated that "the Pennsylvania decree was not confined to then existing situations, but was designedly drawn as a comprehensive and permanent regulation of the future" (Appellant's Brief, p. 26). An injunction, though prospective in operation, is no broader in scope than is justified by the facts alleged in the petition by which it is procured. See *Conway* v. *Taylor's Executor,* 1 Black 603, 632; *Wyoming* v. *Colorado,* 286 U. S. 494, 508. It is not to be presumed that the consent decree was intended to reach every conceivable violation of the Sherman Act. *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361, 404.

The language quoted by appellant (p. 27) from the opinion of this Court in *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, 321, states clearly the basis for distinction between the New York and Pennsylvania suits. In that case it was held that a decree in favor of the plaintiff upon a libel in admiralty to recover damages for personal injuries

sustained by reason of the negligence of defendant operated as a bar to the maintenance of a second suit at law for the same purpose where the allegations of fact were substantially the same in both cases. In holding that the two suits were grounded upon the same cause of action this Court pointed out that a cause of action consists of a state of facts which result in a legal wrong. In the present case it has been shown that the facts alleged in the New York petition establish a new and distinct violation of the Sherman Act.

C. THE ISSUES PRESENTED IN THE TWO SUITS ARE DIFFERENT

Appellant earnestly endeavors to show that the petition filed in the New York suit "makes no charges that are not enjoined by the Pennsylvania decree" (Brief, pp. 14–23). As determined by the Expedition Court (R. 184), the principal object of the earlier suit was to restrain appellant from continuing certain devices it had employed to perpetuate its monopoly after the expiration of its basic patents in 1906 and 1909 (R. 9–11). An agreement with a Swiss company dividing world markets and four contracts imposing restrictive covenants were alleged to constitute an unlawful restraint of trade (R. 17–22), and certain acts of unfair competition were charged (R. 23–25). By reason of these agreements, contracts, and practices, it was alleged that appellant had maintained a monopolistic position in the aluminum industry

(R. 25–26). In the section of the petition devoted to a statement of the violation charged, it was stated explicitly that that suit was not predicated upon any illegality in the monopoly possessed by appellant at the time of the expiration of its basic patents, or in its acquisition of a monopoly of bauxite deposits in the United States (R. 28). The petition expressly conceded that "defendant's practical monopoly in both bauxite and the manufacture of aluminum in the United States which it held at the expiration of said patents was lawful" (R. 29). It charged only that the means used to maintain that monopoly were unlawful, and it proceeded to specify wherein the five contracts offended against the Sherman Act (R. 29–30).

The object of the New York suit is in striking contrast to the limited objectives of the 1912 suit. The New York petition charges not only the maintenance of a monopoly by contracts and conspiracies in restraint of trade and by unfair trade practices, but goes further and alleges that Aluminum Company's 90 to 100 per cent control of virgin aluminum and related products constitutes an illegal monopoly *per se* (R. 108). That monopoly is described in Section I of the petition (R. 105–

[3] Paragraphs 41–52 of the New York petition describe appellant's monopoly, alleging its 100 per cent control of virgin aluminum, 90 per cent control of sheet, 100 per cent control of extruded and structural shapes, etc. (R. 106–108). Paragraph 53 charges that this monopoly is illegal *per se* by stating explicitly that appellant's monopolistic con-

108).[8] It is alleged that appellant's 100 per cent monopoly of virgin aluminum with the accompanying power to fix arbitrary and discriminatory prices and exclude competitors has the effect of "suppressing and preventing substantial competition which would otherwise arise" in the aluminum industry (R. 108). It is also alleged that appellant has suppressed potential competitors (R. 132).

In view of the difference which exists between the issues of the two suits it is clear that the consent decree cannot operate as a bar to the maintenance of the New York suit. Indeed, in recognition of this fact, appellant has not seen fit to raise the defense of *res judicata* in its answer in the New York suit (R. 269–322).

D. THE RELIEF SOUGHT IN THE TWO SUITS IS DIFFERENT

As stated by the Expedition Court in its opinion, it is in the nature of the relief sought that the dif-

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trol "is inimical to the public interest and in violation of Section 2 of said Sherman Act" (R. 108). Appellant seeks to restrict the meaning of that paragraph, saying that it is "no more than a specification of paragraph 40" (Brief, p. 17). An examination of the petition as a whole shows that paragraph 40 is but an introduction to the three causes of action alleged in the three sections of the petition, each of which terminates with a charge that the facts alleged therein constitute a violation of the Sherman Act (R. 108, 120, 132). That paragraph 53, the charging paragraph of the first cause, is intended to allege that appellant's monopoly is illegal *per se* is clearly shown by the prayer for relief, which asks that "Aluminum Company be adjudged and decreed to be a monopoly in violation of Section 2 of said Sherman Antitrust Act" (R. 133).

ference between the 1912 and the New York suits is most clearly illustrated (R. 184).

The prayer for relief contained in the 1912 petition (R. 31–36) sought an adjudication that appellant had acquired a monopoly unlawfully by means of certain contracts, agreements, and practices (R. 31). It asked a decree canceling restrictive covenants in five agreements (R. 32–33) and an injunction restraining appellant, its officers, agents and representatives from entering into like agreements (R. 33) and from employing certain practices deemed to be in violation of the Sherman Act (R. 34–36).

The relief sought in the New York suit goes far beyond this. It seeks an adjudication of the invalidity of the monopoly held by appellant (R. 133). It prays for a decree dissolving appellant and redistributing its properties, together with such divestiture by all defendants of their stockholdings and properties as may be necessary to dissolve effectively appellant's monopoly (R. 134). To this end the suit seeks the appointment of receivers and trustees who may be needed to effectuate the dissolution (R. 134). Finally, it is asked that the agreement under which Aluminium Limited refrains from competing with appellant in the United States be enjoined, and that in order to establish an effectual guarantee against further suppression of competition between the two corporations, the defendants be required to divest themselves of

such stock holdings as may be necessary to prevent the simultaneous control of both corporations by the same group of defendants (R. 134).

Dissolution was not requested by the petition, nor was it decreed by the consent decree of 1912. Such relief would have been inappropriate and beyond the scope of that suit. A decree "is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered." *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170.

The decree was entered on the express assumption that "the defendant, Aluminum Company of America, has a substantial monopoly of the production and sale of aluminum in the United States" (R. 72). It is apparent therefore that the questions of primary importance in the New York suit—the existence of a monopoly illegal *per se* and the dissolution of Aluminum Company—were neither presented nor adjudicated in the Pennsylvania suit.

The decisions in *Green* v. *Bogue,* 158 U. S. 478, and *Fidelity & Deposit Co.* v. *Gaston, Williams & Wigmore,* 13 F. (2d) 267, cited in appellant's brief (p. 25), have no application here. It is not disputed that *res judicata* may apply to issues arising in a subsequent suit where different relief is sought. Undoubtedly there are in the New York suit issues which were conclusively adjudicated against Alu-

minum Company by the decree of 1912, such as the illegality of the five restrictive contracts which were canceled (R. 64–69). Such determinations are to be observed by the New York court, but they do not preclude the maintenance of that suit, because it rests upon a state of facts materially different from that which gave rise to the Pennsylvania suit.

II

THE NEW YORK SUIT WILL NOT "IMPAIR" OR "DEFEAT" THE JURISDICTION OF THE PENNSYLVANIA COURT OR ANY RIGHTS ACQUIRED UNDER THE 1912 CONSENT DECREE

Appellant would not be entitled to an injunction against the New York suit even if it could show that the subject matter is substantially identical with that presented to the Pennsylvania court in 1912, because it has failed to show that the New York suit would in any way impair or defeat the jurisdiction of the Pennsylvania court or any rights acquired under the consent decree. In the absence of such a showing there is no occasion for the intervention of a court of equity.

A court first acquiring jurisdiction over a subject matter may enjoin a second suit on the identical subject matter "to prevent the defeat or impairment of its jurisdiction." *Steelman, Trustee,* v. *All Continent Corporation,* 301 U. S. 278, 289. Such relief will be granted only to protect the

jurisdiction of the court from active interference or to avoid impairment of its decree. The rule is "based upon necessity", and where the second suit in no way "impairs" or "defeats" the jurisdiction of the first court, the necessity does not exist and the rule does not apply. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 235. In that case the Burke Construction Company had instituted in a federal court in Arkansas a suit for breach of a street paving contract. The defendant thereafter brought a suit upon the same contract in a state court against the Burke Construction Company and the sureties on the bond which had been given for the faithful performance of the contract. The Burke Construction Company then filed an ancillary bill in the federal court to enjoin the prosecution of the suit in the state court. In sustaining the order of the district court denying the injunctive relief, this Court held that although the second suit "presented substantially the same issues" and sought the same kind of relief, it should not be enjoined because it did not tend to "defeat" or "impair" the jurisdiction first acquired by the federal court. It said (pp. 229, 235):

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to *defeat* or *impair* the jurisdiction of the federal court. * * *

> The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and *where the necessity, actual or potential, does not exist, the rule does not apply.* Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter. [Italics supplied.]

This principle has been reaffirmed in *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 198, where it is said that the jurisdiction attaching to the first court "is exclusive only so far as its exercise is necessary" and "does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts."

Appellant predicates its claim for an injunction against the New York suit upon an ambiguous and unsupported contention that it will be subjected to the "peril of conflicting regulation" or "conflicting adjudications" of two courts (Brief, pp. 11, 28, 35, 45). The "conflict" which it professes to fear must mean either (1) that the New York suit contemplates a decree requiring disobedience of the Pennsylvania consent decree, or (2) that the petition for dissolution in the New York suit conflicts with some supposed affirmative right con-

ferred by the consent decree. It is not apparent which of these two possible "conflicts" appellant has in mind.

If the relief sought in New York required Aluminum Company to disobey the Pennsylvania decree, it would constitute an attack upon the decree similar to that condemned in *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214. If the New York suit involved even a remote probability of such a conflict, it is fair to assume that appellant would have called it to the Court's attention. It is manifest from a comparison of the pleadings in the two cases that the New York suit, far from seeking to release the Aluminum Company from its obligations under the consent decree, seeks much more drastic relief against it, and tends to support, rather than break down, the ultimate objective of the consent decree. The decree did not require Aluminum Company to do any affirmative act which the New York suit now seeks to prohibit. The only affirmative action required under the consent decree was the cancelation of restrictive covenants in five contracts. The New York petition, of course, does not seek a revival of the restrictive covenants, but on the contrary joins with the Pennsylvania petition in expressing disapproval of such contracts. It seeks three major forms of relief: (a) dissolution of Aluminum Company, (b) divorcement of Aluminum Company from its Canadian affiliate, Aluminium Limited, and (c) general

injunctive relief against monopoly and restraint of trade. No part of this relief contemplates anything approaching disobedience of the consent decree. If the New York court should grant the prayer for dissolution and for divorcement of Aluminum Company from Aluminium Limited, Aluminum Company obviously would not be required to do any affirmative act in conflict with its duties under the consent decree. If the New York court should prohibit Aluminum Company from engaging in monopolistic and restrictive practices in addition to those enjoined by the consent decree, it is difficult to see in what manner this could subject it to the peril of conflicting decrees.

As it is apparent therefore that the New York suit does not subject Aluminum Company to the "peril of conflicting regulation" in the sense of requiring disobedience of the consent decree, the suggestion of "conflict" must have been intended to imply that the consent decree conferred upon Aluminum Company a perpetual right of non-dissolution and that the New York suit will impair such right.

This contention is so fundamental and dangerous that appellant refrains from urging it explicitly, and prefers to rest upon vague implications. The consent decree reads in the negative, prohibiting Aluminum Company from engaging in certain unfair, discriminatory and monopolistic practices. It did not guarantee to Aluminum Company any conditional right to maintain its monopoly under

"regulation" of the Pennsylvania court, as seems to be implied in appellant's brief (pp. 11, 28–30, 45).

Although appellant now disclaims any contention that the consent decree is a "contract", its petition alleges that the decree is "binding upon" the United States (R. 80). Also its brief suggests that the United States may not "avoid the binding effect" of the Pennsylvania decree (p. 25), and that Aluminum Company is entitled to "rely upon" it (p. 29), citing *United States* v. *International Harvester Co.*, 274 U. S. 693, 703. The language quoted from the *Harvester* case does not mean that a company enjoined by a consent decree is guaranteed immunity from dissolution under a subsequent suit based upon a new cause of action. There is no merit in the contention that the decree of 1912 is "binding upon" the United States in the sense that it precludes a new suit 25 years later to obtain more drastic relief under a different theory. That this Court did not intend to imply in the *Harvester* case, *supra*, that a consent decree is a binding contract between the United States and the defendant enjoined is apparent from the opinion in *United States* v. *Swift & Co.*, 286 U. S. 106, 115, where the Court expressly rejected the contention that a consent decree may be treated as a contract between the parties.

If the consent decree had purported to perpetuate a monopoly or confer affirmative rights upon Aluminum Company to the detriment of the pub-

lic, the decree to that extent would be void, because the law officers of the government cannot bargain away the public's right to enforcement of the antitrust laws. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409; *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 240.

Even if a consent decree were held to be a binding obligation upon the United States, it is not clear which of its provisions Aluminum Company would have occasion to "rely upon." The United States was the victorious party in the 1912 proceeding, and therefore could have no reason for attacking the injunctive provisions of the decree. The defeated party is in no position to show that it acquired any affirmative vested right under the decree, which the New York suit threatens to impair.

The mere prospect of two decrees covering related or partially overlapping subject matters does not warrant an injunction. There must be a clear showing that the New York suit threatens to interfere with the jurisdiction of the Pennsylvania court or defeat or impair affirmative rights acquired under the consent decree.

It may be noted that although Aluminum Company is solicitous to "protect" the jurisdiction of the Pennsylvania court, that court [4] has held that

[4] Appellant's brief recognizes (p. 34) that by virtue of the expediting certificate the "interpretation and enforcement" of the consent decree has been removed permanently to the Expedition Court sitting as the district court. This would seem to be the proper interpretation of the Expediting Act (U. S. C., Tit. 15, Sec. 28). See *Ex parte United States*,

the New York suit does not involve any infringement upon its jurisdiction. It found that "the New York suit does not subject Aluminum Company to the peril of two conflicting decrees" (Finding 8, R. 176). The decision of a specially constituted three-judge court upon a question of fact will not be set aside except upon a very clear showing of error. *Chicago G. W. Ry.* v. *Kendall,* 266 U. S. 94, 100–101.

Appellant virtually concedes that the New York suit is not designed to "reverse" any action taken by the Pennsylvania court in 1912, for it does not assign as error the Expedition Court's finding that:

> The New York suit does not attack the affirmative injunctive provisions of the 1912 decree or seek to reverse any action taken by the District Court for the Western District of Pennsylvania in the suit of 1912. [Finding 7, R. 176.] [See assignment of errors, R. 188–206.]

As it is manifest that the New York suit seeks additional relief against the unsuccessful party to the earlier suit, there could be little basis for asserting that it is designed to reverse or attack the earlier adjudication.

The circumstances under which a second suit may be enjoined "to prevent the defeat or impairment" of the jurisdiction acquired by the first

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226 U. S. 420; *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 557–558; *Swift & Co.* v. *United States,* 276 U. S. 311, 322–323.

court are illustrated by the following classes of cases: (1) Where the first court has actual or potential jurisdiction over a *res,* such as a bankrupt estate, and the second suit would interfere with the exclusive jurisdiction of the first court to administer the *res. Steelman, Trustee* v. *All Continent Corporation,* 301 U. S. 278; *Continental Bank* v. *Rock Island Railway,* 294 U. S. 648, 675; *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 241. (2) Where the defeated litigant in the first suit institutes a proceeding in a second court to relitigate the issue and deprive the successful litigant of the fruits of his victory. *Kessler* v. *Eldred,* 206 U. S. 285; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399; *Looney* v. *Eastern Texas R. R. Co.,* 247 U. S. 214; *Trees* v. *Glenn,* 319 Pa. 487. (3) Where one of the litigants in the first suit before final adjudication institutes additional suits on the identical subject matter for the purpose of harassing and vexing his adversary by relitigating issues awaiting final determination in the first suit. *Georgia Power Co.* v. *Tennessee Valley Authority,* 89 F. (2d) 218 (C. C. A. 5, 1937; cert. den. Oct. 11, 1937); *Iron Mountain R. Co.* v. *Memphis,* 96 Fed. 113 (C. C. A. 6, 1899).

1. CASES IN WHICH A SECOND SUIT WOULD INTERFERE WITH THE FIRST COURT'S ADMINISTRATION OF A *RES*

Where the first suit is *in rem,* involving the property of a bankrupt estate, *Steelman, Trustee* v. *All Continent Corporation,* 301 U. S. 278; *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 241, or the re-

organization of a corporation's assets, *Continental Bank* v. *Rock Island-Railway,* 294 U. S. 648, 675, a second suit involving a portion of the same property will be enjoined, because it tends to impair or defeat the court's administration of the *res.* If, however, the second suit does not interfere with control over the *res,* it will not be enjoined. *Kline* v. *Burke Construction Co.,* 260 U. S. 226; *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.,* 171 Fed. 43, 50 (C. C. A. 8, 1909).

In *Steelman, Trustee,* v. *All Continent Corporation,* 301 U. S. 278, a bankruptcy court in New Jersey, administering the bankrupt estate of William Fox, entered an order for examination of the All Continent Corporation because it appeared that the bankrupt had transferred his assets to that corporation to defraud his creditors. Thereafter the All Continent Corporation brought a suit in Pennsylvania to remove a cloud upon its title to certain property, naming the trustee in bankruptcy as a defendant. As the Pennsylvania suit threatened to interfere with the administration of the bankrupt estate, the New Jersey court enjoined the All Continent Corporation from proceeding further in Pennsylvania. Although the New Jersey court had not actually taken possession of the *res,* the Pennsylvania suit would have interfered with its examination of the All Continent Corporation to determine whether it should take possession of its assets. In sustaining the right of the New Jersey

court "to prevent the defeat or impairment" of its jurisdiction, this Court said (p. 285):

> All Continent Corporation, if there is truth in the charges made by the trustee, is a party to a conspiracy to cover up the bankrupt's assets and keep them from his creditors. In that view of the facts, the suit in Pennsylvania will be a step in fulfilling the conspiracy, and may even crown it with success. The inquiry into the fraud, an inquiry going forward in orderly fashion under the supervision of the court of bankruptcy, will be transferred to another jurisdiction with the supposed fraudulent grantee as *dominus litis*. In such a suit there is danger that the issues to be tried may be so narrowly restricted as to shut out the light.

Continental Bank v. *Rock Island Railway*, 294 U. S. 648, did not involve an injunction against prosecution of a suit, but the case illustrates the circumstances under which a court may enjoin other acts which interfere with the exercise of its jurisdiction over the assets of a corporation. The court's jurisdiction having been invoked for the purpose of reorganizing a railroad under Section 77 of the Bankruptcy Act, it enjoined banks holding outstanding notes from selling collateral securing the notes, because the sale of the collateral "would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization" (p. 678). This Court pointed out

that a bankruptcy court is essentially a court of equity which has the inherent power "to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction" (p. 675).

The necessity for enjoining a second suit which threatens to interfere with a *res* and the limitations upon that principle were explained in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 230:

> Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached.
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> * * * * *
>
> But a controversy is not a thing, and a *controversy over a mere question of personal liability* does not involve the possession or control of a thing, and an action brought to enforce such a liability *does not tend to impair or defeat the jurisdiction of the court* in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine

> any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. [Italics supplied.]

The Court quoted with approval from *Baltimore & Ohio R. R. Co.* v. *Wabash R. R. Co.*, 119 Fed. 678, 680, as follows (pp. 231–232):

> The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. * * * The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly *in personam,* in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton* v. *Embrey,* 93 U. S. 548.

The prohibitions of the 1912 consent decree dealt merely with the "personal liability" of the Aluminum Company, and did not "involve the possession or control of a thing." The 1912 suit was not "brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates" or to dispose of any *res* "of a like nature." The New York suit, therefore, "does not tend to impair or defeat the jurisdiction" of the Pennsylvania court over any *res* or "lead to a conflict."

It is true that the New York petition contemplates administration of a *res* in connection with its prayer for dissolution of the Aluminum Company and appointment of a receiver for its properties to effectuate dissolution. It does not follow, however, that there will be conflicting jurisdiction over the *res,* because that *res* was not before the Pennsylvania court when it canceled restrictive covenants and prohibited monopolistic practices.[5]

2. CASES IN WHICH THE DEFEATED LITIGANT SEEKS TO RELITIGATE IN A SECOND COURT

After a litigant has been defeated in one court, he may be enjoined from attacking the decree against him by seeking to relitigate the issue in a

[5] This fundamental distinction between the two suits emphasizes the fact that the subject matter of the New York suit is substantially different from that disposed of in the 1912 suit.

second court. In *Kessler* v. *Eldred,* 206 U. S. 285, Eldred had sued Kessler in Illinois for infringement of his electric lamp lighter patent, and after his bill had been dismissed on the merits, he instituted a second infringement suit against Kessler's customer in a New York court. After assuming the defense on behalf of his customer, Kessler obtained an injunction in the Illinois court restraining Eldred from prosecuting his second suit. This Court upheld the injunction, pointing out (p. 290) that such suits by the defeated party would result in the "impairment or destruction" of the prevailing party's judgment right.[6]

The suit enjoined in *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 426, sought to restrain enforcement of a judgment obtained in an earlier suit.

Looney v. *Eastern Texas R. R. Co.,* 247 U. S. 214, cited in appellant's brief (p. 36), illustrates the general rule that the court first acquiring jurisdiction may enjoin a party from seeking a conflicting adjudication in another court. The

[6] In *Frink Co.* v. *Erikson,* 20 F. (2d) 707, 712 (C. C. A. 1, 1927), the court, distinguishing the *Kessler* case, refused to enjoin a suit for infringement of a reissue patent after the patent holder had lost an earlier suit for infringement of the original patent, because although the issues were very similar, the second suit required "a determination of other questions than the mere validity or invalidity of the original patent."

Interstate Commerce Commission had prescribed certain railroad rates for traffic moving in Texas, and its power to prescribe such intrastate rates had been approved by this Court in the *"Shreveport Case."* The railroads obtained a preliminary injunction in a federal court against the state attorney general who was threatening to bring penalty suits against the railroads for complying with the Commission's order. Thereafter the state attorney general instituted a suit in a state court to enjoin the railroads from complying with the Commission's order. The federal court then enjoined the attorney general from proceeding further in the state court. The maintenance of the proceeding in the state court not only tended to defeat the jurisdiction of the federal court but also threatened to subject the railroads to conflicting orders. The subject matter over which the federal court had jurisdiction was being actively litigated when the attorney general instituted the state proceeding, and the injunction against the latter proceeding was proper and necessary to prevent a "conflict" and "for the purpose of protecting and preserving that jurisdiction until the object of the suit" was accomplished (p. 221). It being impossible to comply with both the Commission's order and the order sought by the attorney general, the federal court could not protect its jurisdiction without enjoining the proceedings in the state court.

In *Trees* v. *Glenn*, 319 Pa. 487, 490, cited in appellant's brief (p. 43), Glenn originally had filed a suit to require Trees to make an accounting for the sale of property. After an adjudication against him, Glenn filed a second suit in another court to relitigate one of the issues disposed of in the first suit. It was held that the first court properly enjoined the defeated plaintiff from prosecuting a second suit, because the issue raised had been determined against him and the suit was therefore an attempt to relitigate and was "clearly vexatious."

As United States was not the defeated party in the 1912 suit, there is no occasion for it to relitigate any issues adjudicated against it in the first suit or to deprive a successful opponent of the benefits of a judgment in its favor. The consent decree is *against* Aluminum Company, requiring it to cancel restrictive covenants in five contracts and enjoining it from engaging in certain unfair and monopolistic practices. Aluminum Company did not and could not obtain relief against the United States in that suit;[7] it was the unsuccessful defendant and acquired no rights under the consent decree. Because no rights were acquired there are no rights which can be defeated by the New York suit.

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[7] The United States may not be sued without its consent, *Cohens* v. *Virginia*, 6 Wheat. 264, and this immunity extends to cross-bills and ancillary suits as well as original suits. *Illinois Central Railroad Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504–505; *De Groot* v. *United States*, 5 Wall. 419, 431.

3. CASES IN WHICH A PARTY DURING ACTIVE LITIGATION INSTITUTES VEXATIOUS SUITS TO RELITIGATE ISSUES PENDING IN THE FIRST COURT

Such cases are illustrated by *Georgia Power Co.* v. *Tennessee Valley Authority,* 89 F. (2d) 218 (C. C. A. 5, 1937; cert. den. Oct. 11, 1937), relied upon in appellant's brief (pp. 40–42). There the Georgia Power Company had instituted a suit in Georgia to enjoin the Tennessee Valley Authority from constructing a transmission line on the ground that the Act creating the Authority was unconstitutional. On May 28, 1936, the Georgia court entered an order denying Georgia Power Company's application for a preliminary injunction. On the very next day the Georgia Power Company, together with 18 other power companies, filed two suits seeking substantially identical relief in Tennessee and Alabama. The Tennessee court granted substantially the preliminary injunction which had been refused by the Georgia court. The Georgia court then enjoined the Georgia Power Company from enforcing its preliminary injunction in Georgia or from continuing the proceedings in Tennessee in so far as they might conflict with the rights acquired by the Authority under the order of the Georgia court. Not only was the Tennessee suit grossly vexatious, but, as pointed out by the Circuit Court of Appeals (p. 220), the preliminary injunction obtained from the Tennessee court "had the effect of overruling the order of the

federal court in Georgia, entered on May 28, 1936, and substantially granted the temporary relief denied in that suit.[4] After a preliminary defeat in the Georgia court it was manifestly inequitable for the Georgia Power Company to relitigate the issue in another court and thereby seek to reverse the action of the Georgia court where the litigation was actively pending.

Appellant's brief (p. 42) relies upon *Alabama Power Co.* v. *Tennessee Valley Authority* (N. D. Ala.), in which the Alabama court on April 15, 1937, enjoined Alabama Power Company from participating with 18 other power companies in a suit against the Tennessee Valley Authority in Tennessee on the ground that the suit sought to relitigate the issues passed upon in *Ashwander et al.* v. *Tennessee Valley Authority et al.*, 297 U. S. 288. Since the filing of appellant's brief the Circuit Court of Appeals[5] has reversed the district court (C. C. A. 5, No. 8469, opinion filed Oct. 19, 1937), holding that the Tennessee suit presented new issues not involved in the *Ashwander* case, *supra,* and that the Alabama court therefore abused its discretion in enjoining prosecution of the Tennessee suit. The court pointed out that the Tennessee Valley Authority could urge its plea of

[5] It may be noted that this is the same Circuit Court of Appeals which sustained the injunction issued by the Georgia court in *Georgia Power Co.* v. *Tennessee Valley Authority*, 89 F. (2d) 218.

res judicata in the Tennessee court and "have the full benefit of it in that case."

Iron Mountain R. Co. v. *Memphis,* 96 Fed. 113, 131 (C. C. A. 6, 1899), resembles the *Georgia Power* case, *supra,* in that one of the parties to an actively pending suit sought to relitigate the issues by instituting suit in a second court. The Iron Mountain Railroad Company filed the first suit in a federal court to enjoin the City of Memphis from attempting to enforce a forfeiture of a contract whereby the railroad was given the right to occupy a city street on condition that it would charge nondiscriminatory rates. Thereafter the City of Memphis instituted an ejectment suit in a state court. The railroad then sought an injunction from the federal court to restrain the city from prosecuting the state case. The injunction was refused, but the Circuit Court of Appeals properly held that it should have been granted to prevent impairment of the jurisdiction of the court before which the litigation was actively pending.[9]

[9] The rule that a court actively engaged in litigation will enjoin one of the litigants before it from filing identical suits in other courts is illustrated in *Higgins* v. *California Prune & Apricot Growers,* 282 Fed. 550, 557 (C. C. A. 2, 1922), where a federal court in New York, whose jurisdiction had been invoked by a California company, enjoined the company from maintaining three identical suits subsequently filed against the same defendant in three different California courts, "the very evident and sole purpose" being "to vex, annoy, and harass the defendants."

It is evident that the New York suit against the Aluminum Company and 62 other defendants does not represent a multiplicity of suits initiated by the United States to harass the Aluminum Company or to relitigate any issues awaiting determination in the Pennsylvania court. Although the 1912 suit is still alive in the sense that the consent decree is perpetual and may be enforced and revised, active litigation was terminated 25 years before the New York suit was filed. The consent decree was filed on June 7, 1912, three weeks after the initiation of the suit, and without submitting any contested issues to the determination of the court (R. 1). It would require much more than a mere showing that Aluminum Company, its subsidiaries, officers and directors have been included among 63 defendants in an antitrust case a quarter of a century later to demonstrate that the United States has resorted to a multiplicity of suits for the purpose of vexing or harassing the company.

An examination of the pleadings in the two cases shows that the New York suit is brought in the public interest, that it does not attack the consent decree or seek to relitigate any issues adjudicated against the United States, and that its purpose is not to annoy or harass Aluminum Company.

The ultimate object of the New York suit, like that of the consent decree, is to enforce compliance

with the antitrust laws. The vital difference is that the New York suit is directed to a new offense, attacks a greater monopoly, and seeks far more drastic relief, including dissolution of the Aluminum Company.

III

APPELLANT HAS SHOWN NO CAUSE FOR INTERVENTION OF A COURT OF EQUITY TO RESTRAIN PROSECUTION OF THE NEW YORK SUIT

A. NO IRREPARABLE INJURY WILL BE SUFFERED AS A RESULT OF THE MAINTENANCE OF THE NEW YORK SUIT

Injunctive relief is not to be granted as a matter of course. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 337–338. It must be predicated upon a showing of imminent irreparable injury. See *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Cavanaugh* v. *Looney*, 248 U. S. 453; *Cruickshank* v. *Bidwell*, 176 U. S. 73.

Appellant's petition rested its claim of irreparable injury upon (1) the inconvenience in defending the suit in New York, and (2) the peril of being subjected to two decrees at the same time covering the identical subject matter (R. 88–90).

In support of its first contention the secretary of the Aluminum Company testified at the final hearing that its active records are kept at its principal office in Pittsburgh and that other records are kept in storage vaults at New Kensington, 18 miles from Pittsburgh (R. 227). He asserted that if the New York suit is prosecuted, the company will

be hampered in its business by the removal of records to New York and by the absence from Pittsburgh of such employees as will be needed for the preparation of its defense (R. 227–228).

Appellant's application for a preliminary injunction was based largely upon its contention that although it had not yet retained New York counsel, it would be obliged to do so, and they would have to file an answer, examine the books and records of the company, and investigate its history from 1902 to 1937 (R. 89, 215, 217). It became apparent, however, at the final hearing on June 23, 1937, that New York counsel had been actually retained on May 12, 1937 (R. 255), two days before issuance of the preliminary injunction (R. 141), that 46 separate answers, including that of Aluminum Company, had been filed in the New York case on June 17, 1937 (R. 253–255, 269–324), that no application had been made to the New York court for an extension of time to answer (R. 259), and that New York counsel had not found it necessary to examine the books and records of the Aluminum Company before filing the answers (R. 248).

Any irreparable injury involved in retaining New York counsel and filing answers has already been suffered. It is fundamental that equity will not enjoin an injury which has already occurred. *Lacassagne* v. *Chapuis,* 144 U. S. 119, 124.

In view of the fact that Aluminum Company writes or receives about 1,250,000 letters per year

and has an accumulation of millions of documents (R. 227, 248), there is no likelihood that the production of a comparatively few letters and other records dealing with restraint of trade and monopoly will seriously hamper the legitimate operations of Aluminum Company. It is apparent that the operating offices of the company have not hitherto been hampered by the absence of their old books and records, because the secretary of the company admitted that the subsidiaries located in New York periodically ship their old records to the storage vault at New Kensington, Pennsylvania, 400 miles away from the operating offices in New York (R. 229). Moreover, as stated in the court's findings, there is no assurance that the Expedition Court would sit in Pittsburgh, "and it is therefore probable that Aluminum Company might suffer substantially the same inconvenience in defending such a proceeding in the 1912 suit as it will suffer in defending the suit in New York" (R. 177).

The inconvenience which appellant may encounter in defending the New York suit does not constitute such irreparable injury as to justify the intervention of a court of equity. Indeed, appellant, cognizant of the manifest insufficiency of this ground, places but little reliance upon it (Brief, pp. 30–31). As the Expedition Court stated in its opinion, "if the fact that it may be necessary for a defendant to retain counsel and prepare a de-

fense amounts to irreparable harm, such as to justify relief by injunction, then an injunction would be available to any defendant in any suit" (R. 185).

Appellant makes no contention that it is faced with a multiplicity of suits such as that which provided the basis for the issuance of an injunction in *Kessler* v. *Eldred,* 206 U. S. 285, 289–290, *supra.* Its brief inferentially suggests (p. 31) that the New York suit is vexatious and its petition asserts that the United States has no right to "harass" it by requiring it to defend in New York (R. 89). There is no allegation of fact to support the contention that the New York suit is vexatious or intended to harass appellant, and no evidence was offered to that effect. The most that is shown is a slight inconvenience in being required to stand trial in another district (R. 227–228). In the absence of a scintilla of evidence to the contrary, this Court will presume that the Attorney General in instituting the New York suit acted in good faith and in the public interest. *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1; *Arthur* v. *Unkart,* 96 U. S. 118.

B. APPELLANT HAS AN ADEQUATE REMEDY IN THE NEW YORK SUIT

Appellant rests its claim for injunctive relief upon the alleged identity between the New York suit and the Pennsylvania suit (R. 80; Brief, pp. 12–22). After an elaborate examination of the

allegations and prayer for relief in the two suits, it concludes that "each paragraph in the New York petition which purports to charge a violation of law deals with a charge which, if true, * * * is enjoined by specific paragraphs of the Pennsylvania decree" (Brief, p. 22). In apparent recognition of the weakness of this assertion, appellant urges its right to injunctive relief upon a broader principle than that of *res judicata* (Brief, p. 35).

The allegation in appellant's petition that it is without adequate remedy at law and that its interests can be protected only by a court of equity (R. 90) ignores the fact that the New York suit is one in equity, in which defendants' interests are to be carefully considered. See *Wilson* v. *Shaw*, 204 U. S. 24, 31. An injunction will be issued to restrain equity proceedings only where it is clearly shown that full and adequate relief cannot be secured in the pending equity suit. *American Seeding Mach. Co.* v. *Dowagiac Mfg. Co.*, 241 Fed. 875, 877 (C. C. A. 6, 1917); *Frink Co.* v. *Erikson*, 20 F. (2d) 707, 712 (C. C. A. 1, 1927).

If appellant is correct in its claim that there is such identity between the two cases as to bar prosecution of the New York suit, it may assert this defense in the New York court. That court is in a better position to determine any issue of *res judicata* in a suit pending before it than is the Pennsylvania court. It could give appellant whatever protection is required by reason of the alleged

identity of the suits. The prosecution of the New York suit may be prevented quite as effectively by its dismissal as it can by an injunction issued by the Pennsylvania court.

The interposition of such a defense in the New York suit would involve no more inconvenience to appellant than it has already experienced in the proceedings before the Pennsylvania court upon its petition for injunction. Under Equity Rule 29 this defense could be tried before the trial on the merits. Appellant would not be required to bring to New York any of its books or records. A certified copy of the Pennsylvania petition and decree would suffice. Upon establishment of its claim, appellant would escape whatever injury it might suffer by reason of the production of its records in a trial of the New York suit on the merits.

Having this remedy available in the New York suit, it is significant that appellant has filed an answer to the New York petition without raising before the New York court any question of *res judicata,* estoppel or identity of the suits (R. 269–322).

C. THE PROBABILITY OF TWO HARMONIOUS DECREES AFFORDS NO GROUND FOR ENJOINING THE NEW YORK SUIT

In its petition appellant alleged that the New York suit subjected it to "the peril of two decrees existing at the same time in two separate and independent courts affecting the same subject matter and issues" (R. 88–89). In its brief this is urged as a ground for injunctive relief (pp. 11, 28, 45).

If, as appellant assumes (Brief, pp. 28–29), the New York court should "enter an injunction order comparable in scope to the Pennsylvania decree", it does not follow that appellant would be irreparably injured. If the consent decree is as sweeping in its scope as appellant contends, condemning every practice challenged by the New York petition and enjoining every conceivable combination or agreement (Brief, pp. 14, 19, 22), it would follow that appellant is in no danger of being subjected to the peril of a second decree broader than the 1912 decree.

As it has been shown in Point II, *supra,* there is no probability of conflict between the two decrees. Both are intended to compel obedience to the Sherman Act, and the affirmative injunctive provisions sought are harmonious. The only difference lies in the fact that the New York petition seeks more drastic relief.

Appellant's assertion that it is entitled to "rely" upon the consent decree until the need for further relief is shown (Brief, p. 29) ignores the fact that the New York petition constitutes an offer to make just such a showing in a trial upon the merits.

D. AN INJUNCTION AGAINST PROSECUTION OF THE NEW YORK SUIT WOULD DEFEAT THE STATUTORY RIGHT AND DUTY OF THE UNITED STATES TO ENFORCE THE SHERMAN ACT

Appellant contends that the issuance of an injunction to restrain prosecution of the New York suit will involve "no countervailing hardship upon

the United States" because it may enforce the Pennsylvania consent decree by contempt proceedings, or it may file a supplemental bill in the Pennsylvania court seeking the dissolution of appellant (Brief, p. 31). Neither of these alternatives affords the United States an adequate method for enforcement of the Sherman Act.

It is doubtful whether the United States could, by a supplemental petition filed in the 1912 suit, secure the relief prayed for in the New York petition. As recognized by the court below, the United States seeks dissolution of appellant on the ground that its 90 to 100 per cent monopoly, "regardless of the devices used to perpetuate the monopoly", is a violation of the Sherman Act (R. 133–134, 184). The decree in the 1912 suit was entered on the explicit assumption that the monopoly *per se* was not a violation of the Sherman Act (R. 72). The decision of this Court in *United States* v. *International Harvester Co.*, 274 U. S. 693, might be regarded as raising doubt whether the more drastic relief sought in the New York suit could be secured by a supplemental bill. In that case the United States had filed suit under the Sherman Act against the International Harvester Company in 1912 seeking dissolution of that company. A consent decree which was entered provided that the defendant should sell certain of its lines of machines in order to restore competitive conditions in the industry. Unlike the consent decree in the present case, it reserved to the

court jurisdiction to grant such further relief to the United States as might prove necessary to effectuate its purpose. In 1923 the United States filed a supplemental petition alleging that the decree had been inadequate to accomplish its declared purpose and seeking the division of the assets of the company among three independent corporations. In affirming the dismissal of the supplemental petition this Court rejected the contention that the decree was intended to restore competitive conditions as they existed before the formation of the company in 1902, saying (p. 702) that "this is entirely inconsistent with the purpose of the consent decree, both as appears from its terms and as it was apparently construed by the District Court itself." In the present case the relief sought in the New York suit is manifestly broader in scope than that which was envisioned by the Pennsylvania court in entering the consent decree.

Even if the scope of the 1912 decree were broad enough to encompass the relief sought in the New York petition, the acts alleged to have occurred subsequent to 1912 would have to be established in a trial upon the merits before the Pennsylvania court. New evidence would be required to demonstrate the right of the United States to the drastic relief sought. The result would be in fact, if not in form, an entirely new antitrust suit against appellant and the 62 other defendants named in the New York petition.

The new suit has so little in common with the old that even if relief were sought in Pennsylvania, a new petition would be more appropriate than a supplemental petition in the 1912 proceeding. It is doubtful whether a supplemental petition alleging the existence of a monopoly *per se* and seeking dissolution of Aluminum Company and comprehensive injunctive relief against 63 alleged conspirators would be proper in view of the limited scope of the original petition.

Whatever may be the status of appellant's wholly owned subsidiaries, its officers, directors, and former directors, it is clear that the 23 other defendants named in the New York petition are not bound by the terms of the 1912 decree. The United States cannot prosecute them for contempt of that decree. Appellant concedes that it "does *not* challenge the right of the Government to bring and maintain a suit against any of the *other* defendants in New York or elsewhere" (Brief, pp. 11, 23). In other words, the government may prosecute 23 of the defendants in New York and 40 of them in Pennsylvania. The subject matter of the New York suit would not lend itself to such a division, especially in so far as it relates to dissolution of Aluminum Company. Hopeless confusion would result if the New York court were to grant the relief sought as to 23 defendants and the Pennsylvania court simultaneously were to grant the relief as to the remaining 40 defendants.

Furthermore, a division of the subject matter of the 1937 suit into two suits would be in conflict with the congressional policy indicated by Section 5 of the Sherman Act and Section 12 of the Clayton Act (U. S. C., Tit. 15, Secs. 5, 22), whereby "other parties" to a monopoly, combination, or conspiracy may be brought before the court from other districts in the interest of enabling the government to proceed against all members of a combination in a single suit.[10]

Under these provisions the United States is entitled to lay the venue in any district where any one of the defendants resides, is found, or transacts substantial business. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Eastman Co.* v. *Southern Photo Co.,* 273 U. S. 359, 372–373.[11] Manifestly appel-

[10] See explanation of Section 5 of the Sherman Act by Representative Culbertson, sponsor of the Act, 21 Cong. Rec., pt. 5, p. 4090, 51st Cong., 1st Sess.; pt. 3, pp. 2640–2642.

[11] The New York venue is amply established. A number of the corporate defendants named in the New York suit are inhabitants of, or found in, or transact business in the Southern District of New York (Finding 12, R. 177). In its answer in the New York suit appellant has admitted that four of the defendant corporations are incorporated under the laws of New York (R. 274–275) and that three maintain offices in New York City (R. 270, 274–275). Thus appellant, the principal defendant in the suit, maintains a sales office in New York City (R. 218, 270), and defendant, The Republic Mining and Manufacturing Co., a 100 per cent subsidiary which is alleged to own or hold more than 90 per cent of the bauxite deposits in the United States commercially suitable for the production of aluminum (R. 106), also maintains an office in New York City (R. 218, 274).

lant must make a strong showing to establish its right to relief which has the effect of denying important procedural rights to the United States. No such showing of equities in its favor has been made. Since it has been demonstrated that no such relief is necessary to protect the jurisdiction and decree of the Pennsylvania court, and that appellant is in no peril of conflicting decrees, its assertion of equity is reduced to the tenuous proposition that it will suffer some inconvenience as the result of the government's choice of the New York venue. Bearing in mind that a number of other defendants in the New York suit may find it more convenient to defend in New York than in Pittsburgh, it is submitted that a balancing of conveniences does not favor the issuance of the injunction sought by appellant.

The United States is not bound by precedent, as appellant insists (Brief, p. 33), to proceed against appellant in the Pennsylvania court in all monopoly cases merely because the 1912 antitrust suit was brought in that court. It has never been the practice of the government to proceed by supplemental petition in an antitrust case where there are new defendants and a new cause of action. In

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Moreover, it has been judicially determined that defendant Aluminium Limited, a Canadian corporation which is one of the principal defendants in the suit, is "found" in New York City. *United States* v. *Aluminum Co., of America*, 20 F. Supp. 13 (D. C. S. D. N. Y., 1937).

a number of instances antitrust suits have been instituted against parties bound by the terms of earlier decrees issued by other courts relating to violations similar in nature to those charged in the later suits. Thus, a decree entered on May 26, 1903, against certain meat packers (*Swift & Co.* v. *United States,* 196 U. S. 375; Decrees and Judgments,[12] p. 63) was followed by the entry of a later decree of February 27, 1920, in another court, although both decrees were directed at related practices of the same defendants (*Swift & Co.* v. *United States,* 276 U. S. 311; *United States* v. *Swift & Co.,* 286 U. S. 106). Likewise, the decree of July 29, 1911, entered upon the mandate of this Court against the Standard Oil Company (*Standard Oil Co.* v. *United States,* 221 U. S. 1; Decrees and Judgments, p. 136) was followed by the institution of a later suit in another court on June 25, 1924, in which similar charges were embodied (*United States* v. *Standard Oil Co.,* 33 F. (2d) 617; reversed on other grounds in *Standard Oil Co.* v. *United States,* 283 U. S. 163). Subsequent to the entry of the decree of June 7, 1897, against the Trans-Missouri Freight Association (*United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; Decrees and Judgments, p. 6) a different court granted a temporary injunction on May 31, 1910, although matters related to the original decree

[12] Decrees and Judgments in Federal Antitrust Cases, Government Printing Office, Washington, D. C., 1918.

were involved (Decrees and Judgments, p. 243). After the entry of the final decree of March 31, 1919, involved in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (D. C. S. D. N. Y., 1916) a later decree affecting some of the same defendants was entered in *United States* v. *Corn Derivatives Institute, et al.* (N. D. Ill., Eq. No. 11634, Apr. 6, 1932).

If there is merit in appellant's contention that a defendant once enjoined by an antitrust consent decree may not be prosecuted in another court on subsequent monopoly charges, the government would be blocked from instituting comprehensive antitrust suits in many major industries. Thus, if one of the 63 defendants in the New York suit could show that it is already subject to an antitrust decree in New York, it could insist upon the right to stand trial there, while appellant could insist upon trial in Pennsylvania. This would defeat the government's statutory right to prosecute all parties to a conspiracy in one comprehensive suit. A consent decree might then become a guarantee against future prosecution and an instrument to perpetuate monopoly.

IV

THE EXPEDITION COURT ACQUIRED JURISDICTION TO DENY ALUMINUM COMPANY'S APPLICATION FOR PERMANENT INJUNCTION

Appellant's brief (pp. 46–57) presents an extended argument in support of its contention that

government counsel, served outside the district, were subject to the process of the Pennsylvania court, and that at all events their special appearance was waived by invoking the Expedition Court (p. 52). The special appearance was overruled after a preliminary hearing before the district judge (R. 153). Government counsel expressly reserved all rights under their special appearance in participating in the hearing on the preliminary injunction (R. 210), in subsequently filing their answer (R. 154), and in filing the expediting certificate (R. 159–160).

The Expedition Court refrained from any discussion of the court's power to serve process outside the district, explaining:

> We could make a preliminary determination as to whether service of process upon government counsel outside the Western District of Pennsylvania is void, but deem it of paramount importance to determine the controversy upon its merits rather than upon questions of practice and procedure (R. 183).

Although appellant assigned as error the conclusion that the Expediting Act and the Attorney General's certificate conferred jurisdiction upon the Expedition Court (R. 193, 203–205), its brief (p. 34) concedes that the filing of the expediting certificate permanently removed future proceedings in the Pennsylvania suit to the Expedition Court. In view of appellant's apparent waiver of

this assignment, it will not be necessary to discuss at length the basis for the court's jurisdiction.

The jurisdiction of the Expedition Court is based upon Section 1 of the Expediting Act, which provides:

> That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary ab-

> sence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. * * * The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought. (Act of February 11, 1903, c. 544, 32 Stat. 823; U. S. C., Tit. 15, Sec. 28.)

The creation of an Expedition Court is mandatory upon the filing of the Attorney General's certificate that the case is one of "general public importance." *Ex parte United States,* 226 U. S. 420, 424. The Act applies to "all causes and proceedings", and upon the filing of the certificate the Expedition Court acquired jurisdiction to determine all matters which were then before the single judge who had granted the preliminary injunction. The language of the Act bears no indication of any congressional intent that the jurisdiction of the special court should be conditioned upon the waiver of a special appearance previously filed in the district court.

The filing of an expediting certificate is merely the exercise of a statutory procedural right analogous to the right of removal of causes from state courts to federal courts, which is not dependent upon waiver of a special appearance. *Wabash Western Railway* v. *Brow,* 164 U. S. 271,

278. It is an official act by the Attorney General in his capacity as an executive officer by virtue of statutory authority vested in him, rather than in his capacity as a "party defendant" in the 1912 suit. This official act is in no way impaired by his maintenance of a special appearance.

The Expedition Court was not deprived of jurisdiction by the fact that the expediting certificate was filed long after institution of the suit in 1912. The Act does not require that the certificate be filed at the time suit is instituted. This is indicated by the provision that it shall apply to proceedings pending at the time of its enactment. Thus in the first case in which such a certificate was filed, the suit had been instituted May 10, 1902, approximately nine months before enactment of the statute. *United States* v. *Northern Securities Co.*, 120 Fed. 721, 722 (C. C. Minn., 1903), affirmed *Northern Securities Co.* v. *United States*, 193 U. S. 197.

The jurisdiction of an Expedition Court is not confined to final hearing on the merits of an antitrust suit. It applies to all proceedings, as appears to be recognized in appellant's brief (p. 34). Once an expediting certificate has been filed in an antitrust suit, an Expedition Court may be called upon after the case has been litigated on its merits to enter a decree upon mandate of the appellate court. *Ex parte United States*, 226 U. S. 420. Section 2 of the Act, which follows the language of Section 1 and provides for direct appeal to this

Court from a "final decree", has been held to apply to a motion to vacate an antitrust consent decree. *Swift & Co.* v. *United States,* 276 U. S. 311. Likewise an appeal from an order denying a petition to intervene after entry of a consent decree in an antitrust suit can be taken only under Section 2 of the Expediting Act. *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 557–558.

It is clear, therefore, that the Expedition Court acquired jurisdiction over the issues raised by Aluminum Company's ancillary petition filed in the 1912 suit, and that it was not deprived of jurisdiction by the reservation of the special appearance.

CONCLUSION

For the foregoing reasons the decree of the specially constituted Expedition Court for the Western District of Pensylvania should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 281.—October Term, 1937.

Aluminum Company of America, Appellant, *vs.* The United States of America.	Appeal from the District Court of the United States for the Western District of Pennsylvania.

[December 6, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

This appeal brings up a final decree of the District Court, Western District of Pennsylvania, three judges sitting, which vacated a preliminary injunction and refused to restrain law officers of the United States from conducting a proceeding against appellant in another district.

June 9, 1912, in the present cause—"Pennsylvania Suit"—when appellant was the only defendant, a consent decree cancelled certain restrictive provisions of designated contracts and forbade future violations of the anti-trust laws by it, its officers, agents and representatives. With certain modifications (1922) presently unimportant this decree remains in force.

April 23, 1937, the United States through their law officers, defendants here, instituted a proceeding in the Southern District of New York—"New York Suit"—wherein the appellant, its officers, agents, stockholders and others (sixty-three in all), were named as defendants. All of these were charged with violating the anti-trust laws and appropriate relief through injunctions, dissolution of appellant, rearrangement of its properties, etc., was asked.

April 29, 1937, in the "Pennsylvania Suit" appellant asked and the District Court entered an ex parte order directing the law officers concerned with the New York suit to appear as defendants. It then filed the petition now before us wherein it prayed for an injunction restraining these officers from proceeding further in New York against it, its wholly owned subsidiaries, officers and directors.

The petition charged that prosecution of the later suit would subject appellant to the peril of concurrent decrees on the same subject matter by two courts; also that there was the possibility of conflicting decrees and unseemly conflict. The prayer for relief rested essentially upon the assertion that the suit embraced subject mat-

ters and issues substantially identical with those previously presented and adjudicated by the consent decree of 1912.

The law officers appeared specially and answered; the Attorney General filed an expediting certificate under the Act of February 11, 1903, as amended, 15 U. S. C. A. 28, 29; a court of three judges assembled, heard evidence, made findings of fact and denied relief. Errors were assigned; this appeal followed.

Plainly, and there is no suggestion to the contrary, appellant cannot succeed unless the Pennsylvania and New York suits are substantially identical in subject matter and issues. It says that comparison of the petitions in the two causes reveals this fact. Also that comparison of the petition in the later suit with the prohibitions of the 1912 consent decree shows the alleged identity, since each charging paragraph of the petition sets up violations of the anti-trust laws inhibited by the decree.

On the other hand, counsel for the United States submit that the two suits differ in substantial respects—defendants, charges and relief prayed.

The court below found: "The subject matter, parties, issues and relief sought in the New York suit differ substantially from those in the 1912 suit. The New York suit does not attack the affirmative provisions of the 1912 decree or seek to reverse any action taken by the District Court for the Western District of Pennsylvania in the suit of 1912. The New York suit does not subject Aluminum Company to the peril of two conflicting decrees. Aluminum Company will not suffer irreparable injury by being compelled to defend the suit in the Southern District of New York. . . ." It concluded that the two suits were dissimilar in respect of parties defendant, subject matter, issues and relief sought, and that no basis for an injunction had been shown.

We have heard counsel, examined the record and briefs, and are unable to say that the court below erred either in respect of its findings or conclusion. The findings are adequately supported and the conclusion reached, we think, is proper. For us again to analyze the pleadings, evidence and decrees and point out the differences and necessary inferences would serve no useful purpose. This was adequately done below.

The challenged decree must be

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this cause.